Mari Boutique Sdn Bhd v Jaya Jusco Stores Bhd

HIGH COURT (IPOH) — CIVIL APPEAL NO 12–28 OF 2003
ABDULL HAMID EMBONG J
1 OCTOBER 2003

Landlord and Tenant — Controlled premises — Rent — Claim for double rent — Whether writ of distress could be issued for recovery of double rental — Whether double rent recoverable as arrears of rent or damages — Distress Act 1951 ss 4, 5(1), (3) and Civil Law Act 1956 s 28(4)(a)

This was an appeal by the appellant/defendant ('the defendant') against the decision of the learned sessions court judge who had dismissed the defendant's application to set aside the writ of distress entered by the respondent/plaintiff ('the plaintiff') pursuant to its ex parte application to the court for a claim for double rental against the defendant as a tenant of the plaintiff. The parties had entered into a three-year tenancy agreement ('the tenancy agreement') with an option of a two year extension. Thereafter, the parties seemingly agreed to the two year extension of the tenancy. However, the plaintiff subsequently terminated the tenancy on grounds of default by the defendant to pay rent due. The defendant alleged that the tenancy had not expired and stayed put on the rented premises. The sole legal issue for determination was whether a writ of distress could be obtained for double rental which the defendant maintained was recoverable as damages under s28(4)(a) of the Civil Law Act 1956. Counsel for the defendant submitted that a distrain for rent was only available to a landlord in the manner provided under the Distress Act 1951 ('the DA') and that pursuant to s 5 of the DA, a warrant of distress may only be issued in respect of a recovery of rent due or arrears of rent. Double rent, he submitted, could not be recovered by distress proceedings as was done in this case.

Held, allowing the defendant's appeal and ordering the writ of distress:

(1) In the local context, distress clearly is governed by statute and the starting point in determining the issue at hand should be s 4 of the DA which disallows any distrain for arrears of rent by a landlord except in a manner as provided by that Act. Section 5(1) allows the issue of a writ of distress for the recovery of rent due or payable to the landlord. Section 5(3) allows for a distrain any arrears of rent upon satisfaction of two conditions, namely, either the tenant is still in occupation of the rented premises or that the goods of that tenant remain on the premises. Both sections are provisions for the recovery of arrears of rent only. Form 118 also states that the DA is provided for and only for the recovery of arrears of rent. There is no provision under the DA for double rental, meanse profit or damages for holding over (see para 15).

(2) The phrase 'shall be chargeable' found under s 28(4)(a) must be read as merely an enabling one, subject to the normal process of proof in a trial. The recovery of double rent under s 28(4)(a) is thus not as of right for the landlord but a matter of the court's discretion. The landlord therefore should not proceed by way of summary process under the DA.

This means that, in a proper case, the court in exercising its discretion may disallow for a claim of double rent, or determine its quantum depending on the circumstances of the case (see paras 17 – 18); *Soong Ah Chow & Anor v Lai Kok Cheng* [1986] 1 MLJ 42 and *Mohamed Abu Bakar s/o Yusof v PA Syed Aboothahir s/o P Ahmed* [1990] 1 MLJ 26 followed.

(3) It cannot be disputed that cl 13.3 of the tenancy agreement is a remedy available to the plaintiff as the landlord, to recover double rent from the tenant holding over. This clause is however a post-termination of the tenancy situation and a summary mode of recovery for double rent is not available under s 5(3) of the DA. It also provides for a liquidated sum to be claimed and since this double rent is not rent but a penal sum, it has therefore to be determined by ordinary way of an action. In other words, a landlord cannot distrain for double rent, the sum not being arrears of rent. To allow the distress process for double rent would mean extending its statutory connotation and such a remedy would be ultra vires s 5 of the DA (see para 22); *Krishna Sreedhara Panicka v Chiam Soh Yong Realty Co Ltd* [1983] 1 MLJ 65 and *Wee Tiang Yap v Chan Chan Brothers* [1986] 1 MLJ 47 followed; *May Properties Sdn Bhd v Kong Phew Keng* [1996] 4 MLJ 37 not followed.

(4) It was held that a claim for double rent could not be made by way of a writ of distress which was a summary remedy strictly for arrears of rent. Double rent, which is a penal sum does not fall under the classification of rent for which the distress process is available as envisaged under the DA. Thus, the writ of distress issued by the sessions court which was purely for the recovery of double rental, a fact not in dispute, must be held to be unlawful (see paras 10, 24); *Bah Heng Hong Sdn Bhd v The Provisional Liquidator Choong Shin Cheong & Anor* [1992] 2 CLJ (Rep) 152 followed.

[**Bahasa Malaysia summary**

Ini adalah rayuan oleh perayu/defendan ('defendan') terhadap keputusan hakim mahkamah sesyen yang bijaksana yang telah menolak permohonan defendan untuk mengenepikan writ distres yang dimulakan oleh responden/ plaintif ('plaintif') menurut permohonan ex partenya kepada mahkamah untuk satu tuntutan untuk sewa berganda terhadap defendan sebagai seorang penyewa plaintif. Pihak-pihak telah memasuki satu perjanjian penyewaan selama tiga tahun ('perjanjian sewa') dengan pilihan lanjutan dua tahun. Selepas dari itu, pihak-pihak tersebut kelihatan telah bersetuju dengan lanjutan dua tahun tersebut. Namun begitu, plaintif kemudiannya telah menamatkan sewaan tersebut atas alasan kegagalan defendan untuk membayar sewa yang perlu dibayar. Defendan mengatakan bahawa sewaan tersebut belum tamat dan tetap menyewa di premis tersebut. Satu-satunya persolan perundangan yang perlu ditentukan adalah sama ada satu writ distres boleh diperolehi untuk sewa berganda yang mana defendan menegaskan hanya boleh diperolehi sebagai ganti rugi di bawah s 28(4)(a) Akta Undang-Undang Sivil 1956. Peguam bagi pihak defendan mengatakan

bahawa satu perolehan untuk sewa hanya wujud kepada tuanpunya tanah seperti yang diperuntukkan di bawah Akta Distres 1951 ('AD') dan bahawa menurut s 5 AD, suatu waran distres boleh dikeluarkan untuk mendapat balik sewa yang perlu dibayar atau tunggakan sewa. Sewa berganda, beliau menegaskan, tidak boleh didapat balik melalui prosiding distres sebagaimana yang dilakukan dalam kes ini.

Diputuskan, membenarkan rayuan defendan, memerintahkan writ distres:

(1) Dalam konteks tempatan, distres dengan jelas dikawal oleh statut dan titik permulaan untuk menentukan persoalan di sini adalah s 4 AD yang tidak membenarkan apa-apa cara mendapat balik tunggakan sewa oleh tuanpunya tanah kecuali dalam cara yang diperuntukkan oleh Akta tersebut. Seksyen 5(1) membenarkan persoalan satu writ distres untuk mendapat balik sewa perlu dibayar kepada tuanpunya tanah. Seksyen 5(3) membenarkan mendapat balik tunggakan sewa jika sua syarat dipenuh, iaitu, sama ada penyewa masih menetap di premis sewaan atau barang-barang penyewa masih berada di premis tersebut. Kedua-dua seksyen adalah peruntukan-peruntukan untuk mendapat balik tunggakan sewa sahaja.. Borang 118 juga menyatakan bahawa AD diperuntukkan untuk dan hanya untuk mendapat balik tunggakan sewa. Tiada peruntukan di bawah AD untuk sewa berganda, untung mense atau ganti rugi untuk pemegangan lepas (lihat perenggan 15).

(2) Istilah 'shall be chargeable' didapati di bawah s 28(4)(a) harus dibaca sebagai hanya satu yang membolehkan, tertakluk kepada proses biasa pembuktian dalam satu perbicaraan. Untuk mendapat balik sewa berganda di bawah s 28(4)(a) bukan satu hak tuanpunya tanah tetapi satu perkara untuk budi bicara mahkamah. Tuanpunya tanah oleh itu tidak sepatutnya bermula melalui proses terus di bawah AD. Ini bermakna bahawa, dalam kes sebenar, mahkamah dalam menggunakan budi bicaranya boleh tidak membenarkan satu tuntutan untuk sewa berganda, atau menentukan kuantumnya bergantung kepada keadaan kes (lihat perenggan-perenggan 17 – 18); *Soong Ah Chow & Anor v Lai Kok Cheng* [1986] 1MLJ 42 dan *Mohamed Abu Bakar s/o Yusof v PA Syed Aboothahir s/o P Ahmed* [1990] 1 MLJ 26 diikut.

(3) Ia tidak boleh dipertikaikan bahawa kl 13.3 kepada perjanjian penyewaan adalah satu remedi yang sedia ada kepada plaintif sebagai tuanpunya tanah, untuk mendapat balik sewa berganda dari penyewa yang pemegangannya telah lepas tempoh. Klausa ini bagaimanapun adalah satu keadaan sebelum penyewaan tamat dan cara terus untuk mendapat balik sewa berganda tersebut tidak didapati di bawah s 5(3) AD. Ia juga memperuntukkan untuk jumlah tertentu yang akan dituntut dan memandangkan sewa berganda ini bukan sewa tetapi satu jumlah penal, ia oleh itu perlu ditentukan melalui cara biasa suatu tindakan. Dalam ertikata lain, seorang tuanpunya tanah tidak boleh mendapat sewa berganda, jumlah yang bukan tunggakan sewa. Untuk membenarkan proses distres untuk sewa berganda akan bermakna menambahkan konotasi statutorinya dan remedi sedemikian adalah ultra vires s 5 AD (lihat perenggan 22); *Krishna Sreedhara Panicka v*

Chiam Soh Yong Realty Co Ltd [1983] 1 MLJ 65 dan *Wee Tiang Yap v Chan Chan Brothers* [1986] 1 MLJ 47 diikut; *May Properties Sdn Bhd v Kong Phew Keng* [1996] 4 MLJ 37 tidak diikut.

(4) Adalah diputuskan bahawa satu tuntutan untuk sewa berganda tidak boleh dibuat melalui satu writ distres yang merupakan satu remedi terus semata-mata untuk tunggakan sewa. Sewa berganda, yang merupakan satu jumlah penal tidak terangkum di bawah klasifikasi sewa di mana proses distres sedia ada sebagaimana yang dibayangkan di bawah AD. Oleh itu, writ distres yang dikeluarkan oleh mahkamah sesyen yang senata-mata untuk mendapat balik sewa berganda, satu fakta yang tidak dipertikaikan, harus diputuskan sebagai menyalahi undang-undang (lihat perenggan-perenggan 10, 24); *Bah Heng Hong Sdn Bhd v The Provisional Liquidator Choong Shin Cheong & Anor* [1992] 2 CLJ (Rep) 152 diikut.]

Notes

For cases on rent, see 9 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 678–741.

Cases referred to

Bah Heng Hong Sdn Bhd v The Provisional Liquidator Choong Shin Cheong & Anor [1992] 2 CLJ (Rep) 152 (folld)

Hiap Lee (Cheong Leong & Sons) Sdn Bhd v Unicla Industries Sdn Bhd [1988] 1 CLJ 512 (refd)

Imbi World Sdn Bhd v Deluxe Tours Sdn Bhd [1997] 3 MLJ 531 (refd)

Krishna Sreedhara Panicka v Chiam Soh Yong Realty Co Ltd [1983] 1 MLJ 65 (folld)

May Properties Sdn Bhd v Kong Phew Keng [1996] 4 MLJ 37 (not folld)

Medfiche SB v Persatuan Teknologi Malaysia [1993] 2 CLJ 345 (refd)

Mohamed Abu Bakar s/o Yusof v PA Syed Aboothahir s/o P Ahmed [1990] 1 MLJ 26 (folld)

Printpak Productions (S) Pte Ltd v Overseas Marketing (S) Pte Ltd 2(2) *Mallal's Digest* (4th Ed, 2001 Reissue) para 2123 (refd)

Soong Ah Chow & Anor v Lai Kok Cheng [1986] 1 MLJ 42 (folld)

Wee Tiang Yap v Chan Chan Brothers [1986] 1 MLJ 47 (folld)

Legislation referred to

Civil Law Act 1956 s 28(4)(a)
Distress Act 1951 ss 4, 5(1), (3)
Distress for Rent Act 1737 [UK] s 18
Landlord and Tenant Act 1730 [UK]
Subordinate Courts Rules 1980 O 38 r 2, Form 118

Haris Ibrahim (Norisman with him) (Haris & Co) for the appellant/defendant.
R Jayasingam (WY Chan & Roy) for the respondent/plaintiff.

Abdull Hamid Embong J:

[1] The appellant/defendant ('the defendant') had appealed against the decision of the learned sessions court judge at Ipoh who on 28 March 2003 had dismissed the defendant's application to set aside the writ of distress entered by the respondent/plaintiff ('the plaintiff') on 2 April 2002 pursuant to its ex parte application to the court. It was not in dispute that the basis of that ex parte application was for a claim for double rental against the defendant as a tenant of the plaintiff, in the sum of RM127,581.25.

[2] On 18 December 1997, the parties had entered into a three-year tenancy agreement beginning 30 July 1997 with an option of a two year extension. By letter dated 26 September 2000, the parties seemingly agreed to the two year extension of the tenancy effective 30 July 2000 till 29 July 2002. The plaintiff then, on 20 February 2001, terminated the tenancy on grounds of default by the defendant to pay rent due. The defendant alleged that the tenancy had not expired and stayed put on the rented premises.

[3] The sole legal issue for determination was whether a writ of distress could be obtained for double rental which the defendant maintained is recoverable as damages under s 28(4)(a) of the Civil Law Act 1956. Encik Haris Ibrahim of counsel for the defendant submitted that a distrain for rent is only available to a landlord in the manner provided under the Distress Act 1951 ('the DA'). He further submitted that pursuant to s 5 of the DA, a warrant of distress may only be issued in respect of a recovery of rent due or arrears of rent. Double rent, he submitted, cannot be recovered by distress proceedings as was done in this case. Section 5(1) and (3) of the DA are now reproduced for easy reference:

> 5 Application for warrant of distress
>
> (1) A landlord or his agent duly authorized in writing may apply ex parte to a Judge or Registrar for an order for the issue of a warrant, to be called a warrant of distress, for the recovery of rent due or payable to the landlord by a tenant of any premises for a period not exceeding twelve completed months of the tenancy immediately preceding the date of the application and the Judge or Registrar may make such order accordingly.
>
> (3) Arrears of rent may be distrained for after the determination of the tenancy, provided that either the tenant is still in occupation of the premises in respect of which the rent is claimed to be due, or any goods of the tenant are still on the premises.

[4] Both sections are provisions for the recovery of arrears of rent only. This limitation, learned counsel said is further amplified by the wordings found in Form 118 provided pursuant to O 38 r 2 of the Subordinate Courts Rules 1980 which states:

> No 118
>
> AFIDAVIT MENYOKONG PERMOHONAN MINTA DISTRESS
>
> (Tajuk Am)
>
> Saya … beralamat di … bersumpah (atau berikrar) dan menyatakan bahawa sayalah tuan tanah (atau wakilnya atau ejennya yang diberikuasa dengan

A sempurnanya) dan bahawa … (defendan) adalah sebenarnya terhutang kepada … dengan jumlah wang sebanyak $ … yang merupakan *tunggakan sewa* bagi premis No … Malaysia yang kena dibayar untuk selama … bulan dari … haribulan … 19 … hingga … haribulan … 19… pada kadar sebanyak $ … sebulan yang kena dibayar dahulu (tunggakan) pada … haribulan dalam setiap bulan (dengan ditolak jumlah wang sebanyak $… yang dibayar kepada akaun).

B Diangkat sumpah (atau diikrarkan) (seperti dalam Borang 71).

[5] The underlined words underscore the purport of the issue of a writ of distress which is for the recovery of arrears in rent, and not for any other sum.

[6] For the plaintiff, Mr Jayasingham submitted that there was no C dispute that the defendant's tenancy with the plaintiff had been terminated. He said that distraining for double rent is permissible in law relying heavily on the decision in *Medfiche SB v Persatuan Teknologi Malaysia* [1993] 2 CLJ 345 in particular on the following passage in the judgment:

D It is the opinion of this Court that if double rent is due it can be distrained for. To hold otherwise would result in an anomalous position where a tenant can avoid distress by terminating his tenancy and then contending as has been done in this case, that until a judgment is obtained in an action at some uncertain date in future, he need not pay any rent at all.

[7] Another case relied upon was *May Properties Sdn Bhd v Kong Phew Keng* [1996] 4 MLJ 37, where the learned judicial commissioner opined:

E The CLA provides the basis for claiming double rental at the owner's option. The owner having exercised his option under the Act, the double rental if not paid is rental due or payable. Section 5(1) of the Distress Act allows an application for the issue of a warrant for the recovery of rent due or payable to the landlord by a tenant of any premises for a period not exceeding twelve completed months of the tenancy immediately preceding the date of the application …

F

[8] Reference was also made to the case of *Imbi World Sdn Bhd v Deluxe Tours Sdn Bhd* [1997] 3 MLJ 531 where the Court of Appeal found the respondent to be in wrongful holding over of the premises after the expiry of the notice to quit and held that the appellants were entitled to double rental. Learned counsel for the plaintiff read cl 13(3) of the tenancy agreement G entered into between the parties and submitted that the plaintiff as landlord may charge double rental on the defendant for wrongful holding over. Clause 13(3) states:

H In the event the Tenant continues to remain in occupation of the Demised Premises and fails to surrender or yield up unto the Landlord the whole of the Demised Premises and every part thereof or fails to remove all his goods (which expression where hereinafter used shall include personnel and property of every description) from the Demised Premises after the termination of the tenancy pursuant to Clause 13.1 herein, the Tenant shall be liable to pay to the Landlord a sum equivalent to double the Rent payable for the Demised Premises for the period between the date of termination of the tenancy and the date of delivery of vacant possession of the Demised Premises to the Landlord.

I

[9] In reply, En Haris adverted to the fact that the respondent in *May Properties* was not represented and the court there had no guidance of

counsel on the law. He also urged this court not to follow *Medfiche* as that decision was not in accord with the law. Learned counsel stated that that decision never addressed the law as stated by s 4 of the DA which says:

> No landlord shall distrain for rent except in the manner provided by this Act.

[10] which dictated that distress action in Malaysia must be confined to the limitations under the DA. Secondly, it was argued that although the Federal Court decision of *Krishna Sreedhara Panicka v Chiam Soh Yong Realty Co Ltd* [1983] 1 MLJ 65 was referred to in *Medfiche*, there was no analysis of s 28(4)(a) of the Civil Law Act 1956 in the latter decision, as to what payments are 'rent' for the purpose of s 5(1) of the DA. Thus, the writ of distress issued by the sessions court which was purely for the recovery of double rental, a fact not in dispute, must be held to be unlawful.

[11] *Medfiche*'s case was critically analyzed in an article by RR Sethu entitled *Distress: An Archaic Remedy In Modern Law* (see [1994] 1 MLJ cliii). The writer argued that the sum provided in s 28(4)(a) of the Civil Law Act 1956 is not the contractual rent. That sum is also not agreed rent but a penalty for a failure to quit when the tenancy had been determined. He then referred to a decision by the same learned judge who decided *Medfiche* in the case of *Hiap Lee (Cheong Leong & Sons) Sdn Bhd v Unicla Industries Sdn Bhd* [1988] 1 CLJ 512, where on this point, his Lordship said that distress was limited to the goods found on the premises which was the actual subject matter 'of the lease agreement under which the rental is in arrears'. A person holding over is a trespasser and he cannot be said to be a tenant liable to pay rent under any 'lease' or tenancy agreement (p clvii of the article). Section 28(4)(a) provides for the landlord to recover double rental by way of compensation for holding over, ie as against a trespasser, and not as contractual rent against a tenant. The writer argued that the remedy of the landlord is to recover double rent, as damages, by an action and not by distress. The writer concluded that the learned judge in *Medfiche* was in error to hold that double rental may be distrained by relying on English law which allows for such a process. The source for that in England is s 18 of the Distress for Rent Act 1737 which provides:

> And whereas great inconveniences have happened and may happen to landlords whose tenants have power to determine their leases, by giving notice to quit the premises by them holden, and yet refusing to deliver up the possession when the landlord hath agreed with another tenant for the same: Be it further enacted , ... that from and after [24 June 1738] in case any tenant or tenants shall give notice of his, her, or their intention to quit the premises ... at a time mentioned in such notice, and shall not accordingly deliver up the possession thereof at the time in such notice contained, that then the said tenant or tenants ... shall from thenceforward pay to the landlord ... double the rent or sum which he, she or they should otherwise have paid, to be levied, sued for, and recovered at the same times and in the same manner as the single rent or sum before the giving of such notice, could be levied, sued for, or recovered; and such double rent or sum shall continue to be paid during all the time such tenant or tenants shall continue in possession as aforesaid.

[12] It was pointed out that there is no similar section in our Distress Act 1951. Further, that section is limited to cases where a tenant, who had given notice to quit, remained in occupation, thus making him liable to pay double rent and equates the recovery of double rent in the same way as single rent is recoverable. Thus, that provision is inapplicable in this country and cannot be a sound foundation in *Medfiche*'s case; the tenant there had not given a notice to quit.

[13] The writer next argued that the learned judge in *Medfiche* was wrong in relying on a passage in *Landlord & Tenant* by Lye Lin Hen which stated that:

> It should be noted that a claim for double value cannot be distrained for as it is not rent and there is no relief in equity. However, a claim for double rent is recoverable either by *action or by distress*, up to the time that the tenant quits. (Emphasis added.)

[14] To find in that case that the landlord may distrain for double rent under s 28(4)(a) since, unlike the British Landlord and Tenant Act 1730, which deals only with double value, s 28(4)(a) deals with both double rent and double value giving the landlord an election, and conclude, that both double rent and double value are penalties and not rent under a tenancy.

[15] I am in agreement with the stand taken by the defendant here and, with respect, confirm the view of RR Sethu in his article as stating the correct interpretation of the law. Sadly, I have to depart from the decision in *Medfiche*. In the local context, distress clearly is governed by statute and the starting point in determining the issue at hand must be s 4 of the DA which disallows any distrain for arrears of rent by a landlord except in a manner as provided by that Act. Section 5(1) allows the issue of a writ of distress for the recovery of rent due or payable to the landlord. Section 5(3) allows for a distrain any arrears of rent upon satisfaction of two conditions, namely, either the tenant is still in occupation of the rented premises or that the goods of that tenant remain on the premises. Sub-section (1) addresses a situation where the tenancy is still subsisting and sub-s (3) is a post termination of the tenancy situation. Both situations however are provisions for the recovery of arrears of rent, the phrases 'rent due' and 'arrears of rent' being, in my view, equivalent in meaning. Form 118 referred to earlier fortifies my view that the DA is provided for and only for the recovery of arrears of rent. There is no provision under the DA for double rental, meanse profit or damages for holding over. Although the word 'rent' is not defined under the DA, the interpretation of the word 'tenant' makes reference to it, stating that:

> 'tenant' means any person from whom the landlord claims rent to be *due under any lease, sub-lease or agreement*. (Emphasis added.)

[16] The emphasized words thus refer to a rent due under an agreement, and not a charge arising under an operation of law such as the double rental allowable pursuant to s 28(4)(a) of the Civil Law Act 1956. This section is now reproduced for easy reference:

> Every tenant holding over after the determination of his tenancy shall be chargeable at the option of his landlord, with double the amount of his rent until possession is given up by him or with double the value during the period of detention of the land or premises so detained, whether notice to that effect has been given or not.

[17] The phrase 'shall be chargeable' found therein must be read as merely an enabling one, subject to the normal process of proof in a trial. The recovery of double rent under s 28(4)(a) is thus not as of right for the landlord but a matter of the court's discretion. The landlord therefore cannot proceed by way of summary process under the DA. The case of *Soong Ah Chow & Anor v Lai Kok Cheng* [1986] 1 MLJ 42, is authority for this proposition where the Federal Court said (at p 43):

> Section 28(4)(a) of the Civil Law Act 1956 provides that every tenant holding over after the determination of his tenancy shall be chargeable, at the option of his landlord, with double rental until possession is given up by him. The effect of s 28(4)(a) was examined in *Krishna Sreedhara Panicka v Chiam Soh Yong Realty Co Ltd* The majority judgment held the view that the court has discretion when to impose double rent. It seems to me that the legislature's choice of the words 'shall be chargeable' clearly implies some discretion.

[18] This means that, in a proper case, the court in exercising its discretion may disallow for a claim of double rent, or determine its quantum depending on the circumstances of the case. In *Mohamed Abu Bakar s/o Yusof v PA Syed Aboothahir s/o P Ahmed* [1990] 1 MLJ 26, Edgar Joseph Jr J puts it in this way (at p 30):

> … By s 28(4) of the Civil Law Act 1956 (Rev 1972), power is conferred upon the court to award damages and/or mesne profits in actions for recovery of immovable property, when the occupant has wrongfully held over, from date of accrual of the cause of action to the date when possession is handed over.
>
> If the court decides to exercise that power, two questions will arise for decision, namely: (1) what was the period during which the occupant wrongfully held over?; and (2) what was the quantum of damages and/or mesne profits payable? Having regard to the circumstances of this case, as appears from this judgment, I can think of no good reason why the plaintiff should be denied their damages or mesne profits and, indeed, counsel for the defendant mentioned none.

[19] The above two cases illustrate the need for an adjudication process before the court can determine damages of either double rent or value. In the first instance, the court must determine whether a former tenant had been guilty of the act of holding over, and if so for what period? Secondly, there may arise, as in the instant case, a dispute on whether there had been a valid termination of the tenancy (see para 6 of defendant's affidavit dated 20 May 2002). This too needs to be resolved by way of an action as was held by TS Sinnathuray J in the Singapore case of *Printpak Productions (S) Pte Ltd v Overseas Marketing (S) Pte Ltd* 2(2) *Mallal's Digest* (4th Ed, 2001 Reissue) para 2123:

> the issue whether the tenancy had been terminated must be resolved in landlord and tenant proceedings and is not one that can be taken in a case where a writ of distress had been issued.

[20] In *Krishna Sreedhara Panicka v Chiam Son Yong Realty Co Ltd*, it was argued for the respondent that the learned trial judge was wrong in not awarding double rent contending that it ought to be given as there is no question of a discretion given to the judge. The majority view of the Federal Court held that double rent is actually damages which may be awarded at the court's discretion. In his judgment, Lee Hun Hoe CJ (Borneo) said this, in reference to s 28(4)(a):

> However, the legislature has, in another Act, used the words 'double the amount of his rent'. The respondents' claim is *actually not rent but a penal sum which the former tenant has to pay* for the inconvenience and loss he causes the landlord in refusing to give vacant possession of the premises on the determination of the tenancy. The provision, being penal in nature, must be construed with some degree of stricture. *In awarding damages the court always has a discretion*. Respondents are asking the court to apply the doctrine of relation back. Damages can only be recovered as from the determination of the lease, whatever form it may take, whether by effluxion of time, notice to quit or by re-entry under a proviso for that purpose. In our case the conduct of the parties were such that the learned judge had to decide as to the best course to take in the absence of any authority to guide him. The learned Judge was of the view that the parties had come to some sort of understanding and considered it to be unconscionable for respondents to claim double rent from the expiry of the notice. (Emphasis added.)

[21] In *Wee Tiang Yap v Chan Chan Brothers* [1986] 1 MLJ 47, the Federal Court equated double rent as a form of damages for trespass.

[22] The above cited decisions are now relied upon to dismiss the plaintiff's contention here that it may recover for double rent summarily, by way of writ of distress, since the tenancy agreement had provided for it in cl13.3. It cannot be disputed that cl 13.3 is a remedy available to the plaintiff as the landlord, to recover double rent from the tenant holding over. This clause is however a post-termination of the tenancy situation and as stated earlier, a summary mode of recovery for double rent is not available under s 5(3) of the DA. This clause, in my view, provides for a liquidated sum to be claimed and since this double rent is not rent but a penal sum, to borrow its description by Lee Hun Hoe CJ (Borneo), it has therefore to be determined by ordinary way of an action. In other words, a landlord cannot distrain for double rent, this sum not being arrears of rent. To allow the distress process for double rent would mean extending its statutory connotation and such a remedy would in my view be ultra vires s 5 of the DA.

[23] Of the authorities cited by the plaintiff, only the case of *May Properties Sdn Bhd* is directly in point to the question at hand. In that case, recovery for double rent was allowed by a writ of distress. However, the issue on its legality was not addressed by the court. This is not surprising since the respondent there appeared in person. As such, the learned judge there did not have the benefit of legal arguments as this court had. For this reason and my view earlier expressed, this court cannot accede to learned counsel of the plaintiff's submission that that decision ought to be followed.

[24] In conclusion, it is now held that a claim for double rent cannot be made by way of a writ of distress which is a summary remedy strictly for

arrears of rent. Double rent, which is a penal sum does not fall under the classification of rent for which the distress process is available as envisaged under the Act. I agree with the view held by James Foong J in *Bah Heng Hong Sdn Bhd v The Provisional Liquidator Choong Shin Cheong & Anor* [1992] 2 CLJ (Rep) 152 who said:

> *The Distress Act 1951 clearly provides for claims of arrears of rental. There are no provisions whatsoever therein to provide for distress on damages.* The plaintiffs themselves have clearly and expressly used the word 'rental' in their distress proceeding and I do not think it can mean any other thing except what he word 'rental' is meant to mean. 'Damages for holding over' may be a type of damages for breach of tenancy but, in this case, liquidated damages are already provided for under the terms of the tenancy agreement. Therefore what was the purpose of the plaintiffs' claim for 'damages for holding over' when their claim for damages was already defined. (Emphasis added.)

[25] For these reasons, this appeal by the defendant is allowed with costs. The writ of distress dated 12 May 2001 issued by the sessions court at Ipoh is ordered to be set aside.

Defendant's appeal allowed with costs. Writ of distress issued by the sessions court set aside.

Reported by Ezatul Zuria Azhari